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No. 84-1082

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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Oppenheimer & Co., Inc.,

*Appellant,*

—v.—

MARCIA A. YOUNG,

*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

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## BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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## ARGUMENT

Appellant Oppenheimer & Co., Inc. ("Oppenheimer") submits this brief pursuant to revised Rule 16.5 of this Court in opposition to the motion to dismiss or affirm of Appellee Marcia A. Young ("Young").

## YOUNG'S MOTION TO DISMISS

Young's motion to dismiss this appeal for want of jurisdiction under 28 U.S.C. §1257(2) (1976) urges that appellate jurisdiction is lacking because there is no *facial* conflict between the Florida Securities Act provision prohibiting arbitration and the Federal Arbitration Act. Thus, according to Young, "none of [Oppenheimer's] challenges involve [*sic*] the 'validity of a statute of any state' . . . ." Motion to Dismiss or Affirm at 3 (brackets added). Young is plainly wrong.

Oppenheimer is definitely challenging the validity of a state statute. In its appeal to the Florida Supreme Court,

Oppenheimer maintained that the pertinent provision of the Florida Securities Act, §517.241, FLA. STAT. (1981), violated the Supremacy Clause. App. 5a. The Florida Supreme Court expressly rejected that contention and sustained the validity of that statutory provision, reasoning that although the provision conflicted with the Federal Arbitration Act, it did not otherwise conflict with or violate federal law. App. 7a. The Florida Supreme Court expressly acknowledged the conflict: "It is true that if we looked only at the text of the FAA [Federal Arbitration Act] we would find conflict between preemptive federal law and our decision here." App. 7a (brackets added).

Jurisdiction under 28 U.S.C. §1257(2) is properly invoked even where there is no facial conflict between federal law and the state statute, and conflict exists only as the statute is applied. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 289-90 (1921). The decision below sustains the constitutionality of §517.241, and accordingly this Court has appellate jurisdiction under 28 U.S.C. §1257(2). *Southland Corp.* v. *Keating,* 104 S.Ct. 852, 856-57 (1984). As this Court held in *Cox Broadcasting Corp.* v. *Cohen,* 420 U.S. 469 (1975), "the statute was drawn in question in a manner directly bearing upon the merits of the action, and the decision in favor of its constitutional validity invokes this Court's appellate jurisdiction." *Id.* at 476.

## YOUNG'S MOTION TO AFFIRM

Young offers three arguments to support affirmance of the decision below: (1) the decision follows both Congressional policy and that of this Court supposedly prohibiting arbitration of "interstate securities" claims; (2) the decision does not conflict with *Southland;* and (3) the decision is correct for "practical reasons." None of these reasons supports an affirmance of the decision below.

The Florida Supreme Court erred in relying on *Wilko* v. *Swan,* 346 U.S. 427 (1953), to support its decision that state securities claims cannot be arbitrated. Young attempts to justify this reliance on *Wilko* by discerning a federal policy prohibiting arbitration of "interstate securities" claims. In

the first place, no such Congressional policy exists. The entire concept of "interstate securities" claims is totally foreign to the federal securities laws and is not even hinted at in any decision of this Court. *Wilko* does not state such a policy. The "anti-waiver" provision of the Securities Act of 1933, 15 U.S.C. §77n (1976), is limited by its terms to claims brought under that Act, and *Wilko* merely holds that claims brought under the 1933 Act cannot be arbitrated. *Wilko* does not deal, expressly or impliedly, with state securities claims, and in light of the broad sweep of the Federal Arbitration Act, *Wilko* should not be extended to bar arbitration of state securities claims.

In *Southland Corp.* v. *Keating*, 104 S.Ct. 852 (1984), the California Supreme Court had also relied upon *Wilko* in holding that state franchise claims could not be arbitrated under California's state franchise act. The California Supreme Court read *Wilko* to empower a state legislature to enact an exception to the Federal Arbitration Act. The *Southland* Court rejected this reading of *Wilko:*

> The California Supreme Court justified its holding by reference to our conclusion in *Wilko* v. *Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed.168 (1953), that arbitration agreements are nonbinding as to claims arising under the federal Securities Act of 1933. 31 Cal. 3d at 602, 183 Cal. Rptr. at 370, 645 P.2d at 1202-1203. *The analogy is unpersuasive.* The question in *Wilko* was not whether a state legislature could create an exception to §2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

104 S.Ct. at 861 n.11 (emphasis added).

Young next contends that *Southland* is distinguishable because *Southland* involved franchise claims—which, of course, it does. *Southland's* holding is in no way diminished by that fact, and *Southland* alone compels reversal of the decision below. In *Southland*, this Court held that a state statute prohibiting arbitration of franchise claims involving interstate commerce violated the Supremacy Clause. In so

holding, this Court concluded that the Federal Arbitration Act is not subject to *any* state-created exceptions:

> In enacting §2 of the federal [Arbitration] Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.* . . . Congress has thus mandated the enforcement of arbitration agreements.
>
> . . . .
>
> In creating a substantive rule applicable in state as well as federal courts, *Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.*

*Id.* at 858, 861 (footnote omitted; emphasis added).

Young's third reason for affirmance is based on "practical reasons." According to Young, the result urged by Oppenheimer would unduly burden investors and the courts.

Pragmatic considerations of lack of uniformity, however, cannot justify departure from Congress' intent, as expressed in the Federal Arbitration Act, to enforce agreements to arbitrate state securities claims. Practical considerations, in and of themselves, cannot supplant clear federal law. Even when the Federal Arbitration Act "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement," the Act must be enforced. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S.Ct. 927, 939 (1983) (emphasis in original).

In any event, there might be bifurcated procedures for resolving a customer's disputes with his stockbroker even in the absence of state blue-sky claims. If, for example, a customer sued under the 1933 Act and for common law fraud, there would be no cognizable basis, even under *Wilko*, to override the Federal Arbitration Act as applied to the common law claims. Thus, the common law claims would be subject to arbitration.

If the decision below is allowed to stand, then three forums could potentially decide claims similar to Young's. Federal

claims would be decided in federal court, state blue-sky claims in state court, and common law claims by arbitration. At least the position urged by Oppenheimer, which is consistent with and mandated by federal law, reduces the forums to two.

Thus, Young's "practical" argument has no independent validity. In any case, in light of the strong federal policy in favor of arbitration and the limited reach of the *Wilko* decision (even assuming its continued viability as to 1933 Act claims), Young's "practical reasons" for affirming the Florida Supreme Court's decision should be given no more weight than her legal arguments.

## CONCLUSION

For the foregoing reasons, Oppenheimer submits that Young's motion to dismiss or affirm should be denied.

Respectively submitted,

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[1] No additions to the Rule 28.1 listing contained in Oppenheimer's Jurisdictional Statement are required.